Petition

Supreme Court, U.S.
FILED
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No. 81-1767

IN THE

Supreme Court of the United States

October Term, 1981

HABIB SABET, HORMOZ SABET and FIROOZ CORPORATION,

Petitioners,

-against-

REPUBLIC NATIONAL BANK OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARK D. LEBOW
Attorney for Petitioners
Habib Sabet, Hormoz Sabet
and Firooz Corporation
200 Park Avenue
New York, N. Y. 10166
(212) 880-4400

Jerry L. Siegel
Coudert Brothers
Of Counsel

March 22, 1982

(12176)

QUESTIONS PRESENTED FOR REVIEW

1. Is the Iran - U. S. Claims Tribunal the exclusive forum to decide a claim (outstanding on the date of the Hostages Agreements of January 20, 1981) by a U. S. bank (as plaintiff) against an expropriated Iranian corporation and against two Iranian individuals who guaranteed the loan (as defendants)?

2. Does a district court have jurisdiction over an action by a New York bank against two Iranian guarantors of a loan to an expropriated Iranian corporation when the U. S. and Iran have entered into a treaty which provides:

> "An International Arbitral Tribunal (the Iran - United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that

national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights...."?

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

HABIB SABET, HORMOZ SABET and FIROOZ CORPORATION,

Petitioners,

-against-

REPUBLIC NATIONAL BANK OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioners Habib Sabet, Hormoz Sabet and Firooz Corporation respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit conditionally affirming the dismissal of petitioners' complaint by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported and is set forth in Appendix A, infra at A-1, et seq. The opinions of the District Court are not reported and are set forth in Appendix B, infra at A-4 et seq.

PARTIES

The plaintiff in the courts below

was Republic National Bank of New York, a New York banking corporation, which is primarily owned and controlled by Trade Development Bank of Geneva, Switzerland.

Defendants were Habib Sabet and Hormoz Sabet, both Iranian citizens, and Firooz Corporation, an Iranian company nationalized by the present government of Iran and, therefore, an entity owned and controlled by Iran.

JURISDICTION

While the courts below initially had jurisdiction on the basis of diversity of jurisdiction, it is respectfully submitted that the courts below were divested of jurisdiction by virtue of the Hostages Agreements and this Court's decision in Dames & Moore v. Regan, 453 U.S. ___, 101 S. Ct. 2972 (1981).

STATEMENT OF THE CASE

Republic National Bank of New York lent $1,500,000 on April 25, 1977 to Firooz Corporation, an Iranian company.

The loan was personally guaranteed by Habib Sabet and his son, Hormoz Sabet.

Both Habib Sabet and Hormoz Sabet are Iranian citizens. They are prominent members of the Baha'i World Faith.

In early 1979, the Islamin Provisionary Government of Iran took power in Iran. Shortly thereafter, Firooz Corporation was expropriated by the new government. The Baha'i World Faith was outlawed. Thousands of its members were killed. Properties of the Sabets and their co-religionists were confiscated. The Sabets managed to flee from Iran, however.

The Sabets paid Republic National Bank $300,000 on July 5, 1979 to reduce the bank loan. Thereafter, the loan went

into default.

Republic then sued the borrower, Firooz Corporation, and the two individual Iranian guarantors in a New York State court for the unpaid principal on the loan of $1,200,000 plus interest.

In August 1979, the Iranian individuals removed the entire case to the Southern District of New York on the basis of diversity jurisdiction.

In November 1979, the American Embassy in Teheran was seized and Americans there were held as hostages.

On July 18, 1980, the District Court granted summary judgment against Habib and Hormoz Sabet on their guarantees. Default judgment was granted against Firooz Corporation, conditioned upon the bank serving Firooz in a prescribed manner.

On July 20, 1981, the U. S. hostages in Iran were freed after 444 days

in captivity.

The release of the hostages came after weeks of around-the-clock discussions between a U. S. team and an Algerian team, the latter being selected by the Iranian Government to act as an intermediary in exchanges leading to the hostage release.

The agreements which eventually concluded the Iranian crisis were adhered to at Algiers on January 19-20, 1981. These agreements were transmitted to Congress by the U. S. Department of State on March 12, 1981, along with an "explanatory statement" summarizing the five documents.

Although Hormoz Sabet moved for reconsideration of the district court's decision, the district court denied the motion on March 25, 1981.

On December 21, 1981, the United States Court of Appeals for the Second Circuit affirmed the judgments against

Habib Sabet and Hormoz Sabet "substantially for the reasons stated in the opinions of the district court, William C. Conner, Judge, dated July 18, 1980 and March 25, 1981."

THE HOSTAGES AGREEMENTS

The Hostages Agreements, which were transmitted to Congress on March 12, 1981, were upheld by this Court in Dames & Moore v. Regan, 453 U. S. ___, 101 S. Ct. 2972 (1981). This Court specifically upheld the following provisions of the Hostages Agreements:

1. The United States is obligated

> "to terminate all legal proceedings in United States courts involving claims of United States... institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding

arbitration."

2. The exclusive forum to resolve all claims by a U. S. institution and any Iranian entity or national was established:

> "An International Arbitral Tribunal (the Iran - United States Claims Tribunal) is hereby established for the purposes of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction of occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights...."

One of the Hostages Agreements was entitled "Technical Arrangement Between Banque Centrale d'Algerie as Escrow Agent and the Governor and Company of the Bank of England and the Federal Reserve Board

of New York as Fiscal Agent of the United States dated January 20, 1981."

DOLLAR ACCOUNT NO. 1

Pursuant to the Technical Arrangement, two funds were set up. Dollar Account No. 1 (as it was subsequently called) was used to pay principal and interest on all loans made by banking syndicates of which U. S. banks were members. All such syndicated bank loans have been fully paid and satisfied. The balance of Dollar Account No. 1 is available to satisfy non-bank claims in the arbitral tribunal in The Hague, Netherlands. Iran has agreed to replenish this fund under certain circumstances.

DOLLAR ACCOUNT NO. 2

Other funds totalling $1,418 billion were transferred to, and are now

retained by, the Bank of England "for the purpose of paying the unpaid principal and the interest owing, if any,...on all other indebtedness held by United States banking institutions of, or guaranteed by the Government of Iran, its agencies, instrumentalities or controlled entities not previously paid...." These funds are known as "Dollar Account No. 2."

Dollar Account No. 2 was funded with $1,418 billion. Accrued interest thereon currently exceeds $300 million. Dollar Account No. 2 thus consists of more than $1,718 billion.

Dollar Account No. 2 is available for claims of United States banks only. The balance of the fund must be returned to Iran.

Approximately 40 United States banks (which were not participants in syndicated loans) filed claims against Dollar Account No. 2. Their claims totalled

approximately $700 million.

It is thus obvious that ample funds exist to pay all claims by all American banks concerned.

Republic National Bank of New York is one of the U. S. banks which filed claims in London against Dollar Account No. 2. It participated in settlement negotiations in London. While negotiations are currently in recess, it has been widely reported in the press that an agreement on Dollar Account No. 2 is expected to be reached in the near future.

In any event, there is little doubt that Republic National Bank's claim against Firooz Corporation is amply covered by Dollar Account No. 2.

REASONS FOR GRANTING THE WRIT

I

THE SECOND CIRCUIT ERRED IN HOLDING THAT IRAN-UNITED STATES CLAIMS TRIBUNAL WAS NOT THE EXCLUSIVE FORUM FOR RESOLUTION OF AN ACTION BETWEEN A NEW YORK BANK (AS PLAINTIFF) AND AN EXPROPRIATED IRANIAN CORPORATION AND TWO INDIVIDUAL IRANIAN GUARANTORS OF THAT CORPORATION'S LOAN (AS DEFENDANTS).

The Hostages Agreements conferred exclusive jurisdiction on the Iran - United States Claims Tribunal of any claim between a United States "institution" and an Iranian "national."

The district court below entered judgment against the two Iranian citizens and nationals who guaranteed the loan. The Second Circuit refused to set aside the judgments.

The courts below were ousted of jurisdiction, and the judgments below should be vacated. Dames & Moore v. Regan, 453 U. S. ___, 101 S. Ct. 2972 (1981).

This Court should hold, consistent with Dames & Moore v. Regan, that U. S. district courts lack jurisdiction over claims by an American bank against an Iranian corporation and Iranian guarantors. A determination requiring Republic National Bank to claim only pursuant to the mechanism set forth in the Hostages Agreements is especially appropriate, because Republic National Bank's claim is against Dollar Account No. 2, which is fully and excessively funded. Dames & Moore's claim was against Dollar Account No. 1, which may have to be replenished when exhausted.

The facts that the loan agreement here applied New York law and that one of the Iranian guarantors has assets in New York, are not sufficient to overcome the clear divesture of jurisdiction contained in the Hostages Agreements. The Hostages Agreements clearly ousted United States

courts of jurisdiction as to any claims against any Iranian national existing on January 20, 1981.

II

BY FULLY FUNDING DOLLAR ACCOUNT NO. 2, REPUBLIC'S LOAN WAS PAID, SO THAT THE COURTS BELOW LACKED JURISDICTION AND POWER TO ENTER JUDGMENTS AGAINST THE INDIVIDUAL IRANIAN GUARANTORS.

The Hostages Agreements provided for the full and complete funding of Dollar Account No. 2. That fund consists of more than $1,718 million. Claims of United States banks with non-syndicated loans are only about $700 million.

The Hostages Agreements clearly provided that Dollar Account No. 2 was the exclusive mechanism for American banks to satisfy their claims against Iranian nationals. While non-bank claimants do not have their claims fully funded, bank claimants do have all of

their claims fully funded.

Therefore, there are even more compelling reasons to require Republic National Bank to comply with the executive orders and agreements which this Court upheld in Dames & Moore v. Regan than existed when this Court required Dames & Moore to so comply.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK D. LEBOW
Attorney for Petitioners
Habib Sabet, Hormoz Sabet
and Firooz Corporation
200 Park Avenue
New York, N. Y. 10166
(212) 880-4400

Jerry L. Siegel
Coudert Brothers
Of Counsel

APPENDICES

APPENDIX A

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-first day of December, one thousand nine hundred and eighty-one.

Present:

HONORABLE WILLIAM H. TIMBERS,

HONORABLE AMALYA L. KEARSE,

HONORABLE RICHARD J. CARDAMONE,

Circuit Judges,

REPUBLIC NATIONAL BANK OF NEW YORK,	
Plaintiff-Appellee,	
- v. -	No. 81-7464
HABIB SABET, HORMOZ SABET and FIROOZ CORPORATION,	
Defendants,	

HABIB SABET and HORMOZ SABET,

Defendants-Appellants.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be repeated, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in the opinions of the district court, William C. Connor,

Judge, dated July 18, 1980 and March 25, 1981.

/s/ William H. Timbers

/s/ Amalya L. Kearse

/s/ Richard J. Cardamone

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
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A. DANIEL FUSARO, CLERK

APPENDIX B

OPINION OF THE DISTRICT COURT
DATED JULY 18, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

REPUBLIC NATIONAL BANK OF NEW YORK, : 79 Civ. 4290
Plaintiff, : (WCC)

-against- : OPINION AND ORDER

HABIB SAVET, HORMOZ SABET and FIROOZ CORPORATION, :

Defendants.

----------X

A P P E A R A N C E S :

KRONISH, LIEB, SHAINSWIT, WEINER & HELLMAN, ESQS.
Attorneys for Plaintiff
1345 Avenue of the Americas
New York, New York 10019

ADAM WALINSKY, ESQ.,
THOMAS J. LENNON, ESQ.,
Of Counsel

COUDERT BROTHERS
Attorneys for Hormoz Sabet
200 Park Avenue
New York, New York 10017

MARK D. LeBOW, ESQ.,
J. L. SIEGEL, ESQ.,
J. D. POPE, ESQ.,
Of Counsel

CONNER, D. J.:

This removed action is presently before the Court on plaintiff's motion for summary judgment in lieu of a complaint.

Background

This is an action on a promissory note (the "note") in the principal amount of $1,500,000 executed by defendant Hormoz Sabet in his capacity as president of defendant Firooz Corporation ("Firooz"), at that time an Iranian private joint stock company; and on an unconditional personal guarantee (the "guarantee") of Firooz's obligations under than note executed by Hormoz Sabet and defendant Habib Sabet, Hormoz's father.[1/] The note and guarantee

were executed at a closing in New York on April 25, 1977, in connection with a loan in the amount of the note made to Firooz at that time by plaintiff Republic National Bank of New York ("Republic").

Documents presented to Republic at the time of the closing indicate that the note as executed was a binding oblication of Firooz: those documents certify that the Firooz Board of Directors had approved the obtaining of a loan in this amount from Republic and had authorized Hormoz Sabet

> "to negotiate with the Bank all the Terms and Conditions necessary for the Company to obtain the Loan from the Bank and to sign any contracts, agreements, promissory notes or other...instruments with or in favor of the Bank, necessary to obtain the Loan,"

and indicate that this Board resolution had been duly adopted and was in full force and effect on the date of the

closing. In addition, Hormoz Sabet further signed a certificate stating in relevant part that "[t]he execution, delivery and performance by [Firooz] of the Note... have been duly authorized by all necessary corporate action," and that "[t]he Note [constitutes] a legal and binding obligation of "Firooz' enforceable against the Company in accordance with its terms."

The note provides in relevant part that Firooz will pay the principal sum of $1,500,000 to Republic, due on March 29, 1979, will pay interest on that amount of principal remaining unpaid before the due date on the first of the month at an annual rate of 9%, and will pay interest at an annual rate of 12% on any amount of principal not paid when due, whether due at stated maturity or by acceleration or as a result of any breach of the maker's convenants. Paragraph 6 of the note states:

> "This note shall be deemed to have been made under, and shall in all respects be governed by, the laws of the State of New York."

The guarantee signed by Hormoz and Habib Sabet states:

> "FOR VALUE RECEIVED, and in consideration of the loan...made and resulting in the indebtedness evidence by the [note]... the undersigned, jointly and severally, hereby unconditionally guarantee to REPUBLIC...that the unpaid principal of and interest on the Note will be promptly paid when due (whether at stated maturity, by acceleration or otherwise) and agree that the time for payment of the Note may be extended, performance of or compliance with any of the agreements of the maker contained in the Note may be extended or waived, the Note may be renewed all without affecting the liability of any of the undersigned hereunder and without notice to any of the undersigned.
>
> 1. Each of the undersigned hereby agrees that the obligations of the undersigned hereunder shall be unconditional irrespective of the genuineness, validity, legality or enforceability of the Note or any other circumstances which might otherwise constitute a legal or equitable discharge of a surety or

> guarantor and regardless of any rule, regulation, decree or order now or hereafter in effect in any jurisdiction purporting to affect in any manner any of the terms of the Note or the rights of the Bank or any subsequent holder...
>
> * * *
>
> 3. ...Each of the undersigned hereby waives presentment, protest, all notices... with respect to the Note, acceptance of this Guaranty and all demands whatsoever, and agrees that this Guaranty, and the liability of each of the undersigned hereunder, shall be construed in accordance with and governed by the laws of the State of New York."

Firooz regularly made the monthly interest payments due under the note from April 1977 through May 1979. In the spring of 1979, the political and economic situation in Iran became somewhat unstable following the departure of the Shah and the establishment of the Islamic Provisionary Revolutionary Government. Plaintiff does not dispute Hormoz Sabet's statement that by June 1979, Firooz and the Zam Zam Bottling Company ("Zam Zam"),

an Iranian corporation also previously controlled by the Sabets, and a corporate guarantor of the Firooz note, had been expropriated by the Islamic Provisionary Revolutionary Government. The parties disagree on certain other matters pertaining to developments over these months, but agree that the principal amount of the Firooz loan was not repaid on March 29, 1979, as provided in the note and that on June 27, 1979, Cyril Dwek, Executive Vice President of Republic, sent Habib Sabet a telegram as follows:

> "KINDLY NOTE THAT THE THREE MONTHS EXTENSION WHICH WAS EXCEPTIONALLY GRANTED TO YOU LAPSES ON JUNE 29, 1979.
>
> "IN VIEW OF OUR OLD AND GOOD FRIENDSHIP AND IN ORDER TO AVOID ANY MISUNDERSTANDING OR EMBARASSMENT [sic] PLEASE BE IN TOUCH WITH MR. ALBERT BENEZRA AT TRADE DEVELOPMENT BANK GENEVA REGARDING THE REPAYMENT OF THIS LOAN."

The parties further agree that on July 5, 1979, Hormoz and Habib Sabet sent Republic

a check for $300,000; that Republic accepted this as part payment of principal on the Firooz loan; and that on July 2, 1979, Hormoz and Habib Sadet tendered a check in the amount of $15,500, representing interest at 12% on the Firooz loan of $1,500,000, and Republic accepted that check.

Proceedings

Subsequently, Republic brought this action in the Supreme Court of the State of New York, New York County, to recover the unpaid principal on the note, or $1,200,000, plus interest at the post-due rate of 12% from July 1, 1979, by means of an ex parte attachment order issued pursuant to CPLR § 6201(1) and by service of a summons and notice of motion for summary judgment in lieu of a complaint pursuant to CPLR § 3212, which authorizes such a procedure in actions based upon an instru-

ment for the payment of money only. In accordance with the attachment order, Republic directed the Sheriff of the City of New York to levy against the contents of Hormoz Sabet's apartment at 820 Fifth Avenue in New York, and the sheriff did so. Papers were served on defendant Hormoz Sabet on July 31, 1979, and on Gulf Associates, Inc., the agent specified for service of process on Firooz in Paragraph Four of the note, on August 6, 1979.

On August 15, 1979, defendant Hormoz Sabet filed a petition for removal of the case to the Southern District of New York on behalf of "all defendants served with process." The petition asserts that federal jurisdiction exists over the action based on diversity of citizenship, since Republic is a national banking association, with its principal place of business in New York, while Firooz is an Iranian corporation with its principal

place of business in Teheran and each individual defendant is an Iranian citizen. Plaintiff did not oppose the petition, and the case was duly removed, with pending motions of Hormoz Sabet to vacate the attachment and of plaintiff to confirm it.

On September 6, 1979, the parties entered into an agreement settling the issues raised by the motions to vacate or confirm the attachment. The agreement provides that Hormoz Sabet retains the right to seek recovery from Republic for demages to or loss of any of the items removed from his apartment by the sheriff, or damage to the apartment resulting from the sheriff's seizure of such items.

On September 27, 1979, Habib Sabet was served with a summons and notice of motion in this case by a process server authorized with the doorkeeper at Habib Sabet's Paris residence and mailed a copy to him at that address. See affidavit of

service signed at the United States Embassy on September 28, 1979.

Contentions

A. Hormoz Sabet

Hormoz Sabet, the only defendant to appear formally in this action, has raised several contentions in opposition to plaintiff's motion. First, he contends that an issue of material fact exists with respect to whether Republic extended the due date of the Firooz note until March 29, 1980. In support of his assertion that this extension was granted, Hormoz Sabet states that Habib Sabet arranged for such an extension orally with Cyril Dwek of Republic in March 1979, and points to his letter of March 13, 1979 to Dwek, which states, in relevant part,

> "I refer you to your discussions with Mr. Habib Sabet in Paris, whereby you kindly confirmed your acceptance to extend for a period of one year the loan

> in the amount of $1,500,000 extended to the Firooz Corporation.
>
> "Mr. Habib Sabet will be in New York in the near future and will be meeting with you to discuss this matter.
>
> "Alternatively, I shall return to New York within the next two weeks after a trip, and shall look forward to seeing you at that time."
>
> Affidavit of Hormoz Sabet of October 12, 1979, Exh. 3.[2/]

Secondly, Hormoz Sabet maintains that pursuant to an oral agreement entered into in Geneva, Switzerland, between Habib Sabet and Albert Benezra ("Benezra"), a director of Republic's affiliate, the Trade Development Bank of Geneva, following Dwek's telegram of June 27, 1979 demanding payment on the Firooz note, Republic agreed that, in return for the Sabet's immediate payment of $300,000 in principal on the note (which the Sabets assert was not yet due under Dwek's earlier extension), and for the Sabets' un-

dertaking to assure interest payments on the extended Firooz loan, Republi would reaffirm Dwek's earlier grant of a one-year extension and would "endeavor to collect from the Firooz Corporation in Iran the full amount of the principal and interest due under the Note and to use a portion of the proceeds to repya to the Sabets the $300,000 which they personally were paying to Republic National Bank," as well as to collect from Zam Zam certain other monies due on a loan to Zam Zam and reimburses the Sabets for payments they had made to Republic under their personal guarantee of that Zam Zam obligation (the "Geneva agreement"). Since Republic has not attempted to collect either from Firooz or from Zam Zam, Hormoz Sabet alleges, Republic has breached the Geneva agreement with the Sabets and extinguished any duty the Sabets had to repay monies under the Firooz note.

In his Supplemental Affidavit of Novembet 2, 1979, Hormoz Sabet also asserts that, apparently as a result of a meeting with Republic's Honorary Chairman Edmond Safra in July 1979, as further consideration for the one-year extension, he and Habib Sabet agreed to and did provide assistance to Republic in Republic's attempts to satisfy a $6 million loan previously made by Republic to the AKAM group of Iranian companies.

In connection with this defense, Hormoz Sabet requests discovery to ascertain whether any writings exist in Republic's or its affiliate's files relating either to the alleged March extension of the Firooz note due date or to the alleged Geneva agreement.

Thirdly, Hormoz Sabet asserts counterclaims against Republic for damages based on the bank's breach of the alleged Geneva agreement and for damage

caused by the sheriff's execution of the attachment order against Hormoz Sabet, including damage due to loss of or injury to the personal property of Hormoz Sabet and his family and damages to the Sabet apartment as a result of the seizure, and injury flowing from the inconvenience and embarrassment suffered as a result of the seizure. Hormoz Sabet computes these total damages as in excess of $1,500,000, with damages from the sheriff's seizure alone estimated at over $100,000. Hormoz Sabet contends that the existence of these counterclaims alone precludes a grant of summary judgment on plaintiff's claims.

Fourthly, Hormoz Sabet asserts that in reliance upon the one-year extension allegedly agreed to by Republic in March 1979, he and Habib Sabet decided not to request extensions of other loan obligations which were to become due and owing, and made payments of principal and

interest to Citibank, N.A. and Irving Trust Company "using monies which, but for the one-year extension agreed to by Republic, would not have been expended in this manner," to the Sabets' detriment, and that Republic is, accordingly, estopped from denying the validity of the loan extension.

Fifthly, Hormoz Sabet contends that Republic failed to comply with an oral promise allegedly made to Hormoz Sabet by Republic at the time of the April 25, 1977 closing to satisfy the formalities essential to a valid agreement under the corporate by-laws of Firooz by sending a copy of the note as executed by Hormoz back to Iran to obtain a second signature and the Firooz corporate seal. As a result, Hormoz Sabet asserts, the note is not binding on Firooz and the guarantee cannot therefore be enforced against the Sabets. Hormoz asserts, in addition, that

Republic's failure to ensure the validity of the note destroyed any rights of subrogation the Sabets might have had against Firooz, since "[w]hile the Iranian government may well be willing to waive the note's technical defects for Republic's sake and honor Republic's claims against Firooz Corporation, it will not do so with respect to any such claims of the Sabets," Affidavit of Hormoz Sabet of November 2, 1979. Accordingly, he claims, even if the guarantee would otherwise be binding on him even though the note was not binding on Firooz, this case is equivalent to one in which a creditor's destruction of a guarantor's right of subrogation under UCC § 3-606 discharges the guarantor from liability.

Finally, Hormoz Sabet asserts that Republic has set off Firooz's obligations under the note against the assets of other Iranian instrumentalities currently held

frozen by Republic pursuant to President Carter's Executive Orders of November 14, 1979 and April 7, 1980 and 31 CFR §§ 535.503 and 535.418, so that any claims against Firooz have been satisfied and the Sabets' guarantee obligations have also been satisfied.

B. Habib Sabet

The position of Habib Sabet in this litigation is not entirely clear. Habib Sabet was served with process in France on September 27, 1979. Hormoz Sabet's statement of material issues of fact dated October 15, 1979, filed pursuant to General Rule 9(g) of the Southern District of New York, asserts in paragraph 9 that "[t]he Court does not have jurisdiction over respondents Habib Sabet and Firooz Corporation, since neither has been properly served with process." On October 18, 1979, Habib Sabet filed an affidavit

with the Court, sworn to at the American Embassy in Paris, which states that the "facts set forth in the [October 12] affidavit of Hormoz Sabet are true, accurate and complete to the extent that they refer to matters within my knowledge"; this affidavit does not raise issues of servece or of personal jurisdiction. On November 5, 1979, counsel forwarded the original of that affidavit to the Court without further indication that Habib Sadet intended to contest service or personal jurisdiction. Habib Sabet has filed no further pleadings or papers in this action.

C. Firooz Corporation

Defendant Firooz has not appeared in this action.

D. Republic

Plaintiff Republic agrees that this Court has diversity jurisdiction over

this action, and asserts that the Court has personal jurisdiction as well over all of the named defendants. As to the several defendants' obligations under the note and guarantee, Republic contends that on or about March 29, 1979, the due date of the Firooz note, it agreed to a three-month extension, to June 29, 1979; that on June 27, 1979, in the Dwek telegram, it demanded payment on the note; that, as described above, the Sabets made certain principal and interest payments in July 1979, but have not fully covered their obligations under the guarantee; and that the balance of the principal plus monthly interest on that sum is due and owing.

In response to Hormoz Sabet's asserted defenses, plaintiff first states that none of its officers or personnel made any oral promise, either in March 1979 or at the June 1979 meeting in Geneva, to extend the due date of the Firooz

note for a year, to attempt to collect the principal and interest due under the note from Firooz directly, or to attempt to collect amounts due under the Zam Zam note, also guaranteed by the Sabets, from Zam Zam. The supporting affidavit of Cyril Dwek, for instance, states that Dwek never agreed to the alleged extension in March and never agreed to collect outstanding loans from Firooz or Zam Zam, and that

> "[o]n several occasions, including after Hormoz [Sabet]'s March 13 letter...I informed Habib and Hormoz...that Republic would not even consider granting any extension other than a three month extension to June 29, 1979, unless Habib and Hormoz provided collateral for the loan..."

Albert Benezra's affidavit indicates that he discussed an undertaking by Republic to "attempt to collect the loan which is the subject of this action from Firooz or to attempt to collect another loan from the Zam Zam Bottling Company," with Habib and

Iraj (Hormoz's brother) Sabet in July 1979, but only if the Sabets provided satisfactory collateral for the Firooz loan, which the Sabets did not supply.

Raphael Husni, Vice President of Republic, states in his affidavit that he has examined the files in Republic's New York office "in which any documents relating to this loan or any extension of it would be likely to be filed, namely the loan file and credit department files regarding the Sabets and their corporations," and that the only document in those files relating to an extension of the Firooz loan or guarantee on any terms is the Dwek Telex message of June 27, 1979.

Next, plaintiff asserts that even if such an oral agreement was made, the agreement as alleged by Hormoz Sabet is not binding on plaintiff, since Hormoz Sabet has not alleged that he and his father gave any return promises or performed

any acts which would constitute consideration for the alleged promises by plaintiff. Plaintiff states that, since the note was due in March, the Sabets' alleged promises in June and July to pay the principal and interest due on the note, even if confirmed by actual part payment, were merely promises to do what the Sabets were already obligated to do under the guarantee, and are insufficient consideration as a matter of law to make Republic's alleged promises enforceable. Plaintiff further argues that Hormoz Sabet's later allegations of a promise by the Sabets to assist Republic, in some unspecified manner, in collecting certain other, unrelated loans is too vague and unsubstantiated an allegation to state adequate consideration or support a denial of summary judgment. Plaintiff also argues that New York General Obligations Law § 5-1103, which provides that an agreement to modify

an existing contract needs no consideration to be enforceable if the agreement to modify is "in writing and signed by the party against whom it is sought to enforce the change, modification or discharge" is not applicable here, since no such written extension agreement or undertaking by Republic to attempt to collect from Firooz or Zam Zam exists. Thus, plaintiff argues, the alleged extension and alleged Geneva agreement are no defense to plaintiff's action.

Thirdly, plaintiff argues, the alleged extension and related Geneva agreeements, lacking consideration or enforceability, do not create any cause of action for their alleged breach, and thus do not state counterclaims whose existence should preclude the granting of summary judgment, while Hormoz Sabet's claims for damages to his apartment, and other damages resulting from the seizure, are

based on facts distinct and separable from the facts relating to plaintiff's motion for summary judgment on the note and guarantee, and should not affect the entry of summary judgment for plaintiff on the note and guarantee claims.

As to Hormoz Sabet's estoppel claim, plaintiff asserts that the Sabets' actions in paying off their other outstanding loans instead of seeking extensions on those loans is not "unequivocally referable" to the alleged promises by plaintiff; notes that Hormoz does not state in his allegations when those loans were due; and asserts that Republic's acceptance in July 1979 of a June interest payment on the loan, which the Sabets were required to make under the terms of their guarantee, should not estop Republic from enforcing the Sabets' obligations to pay the loan principal and to make further interest payments.

With respect to Hormoz Sabet's defense based on alleged noncompliance with the formalities required to make the note a valid obligation under Iranian law, due to Republic's alleged breach of its alleged oral agreement, plaintiff states that such an allegation is one which no reasonable mind could credit, and would, in fact, if true, make Hormoz Sabet guilty of criminal fraud in procuring the loan, given Hormoz Sabet's execution at the closing of the certificates quoted above concerning the due authorization and execution of the note, Hormoz Sabet's signing, along with the other Firooz board members, of the resolution authorizing him to sign the note to obtain the loan, and the three opinions of counsel presented at the closing, including that of Iranian counsel to Firooz, that the note was the legal, valid and enforceable obligation of Firooz.

Finally, plaintiff responds that Republic's offset of Iranian government credit balances of approximately $10 million against its liens and other claims against those assets of over $17 million do not satisfy Firooz's obligations to Republic; and that Republic has no obligation under New York law to satisfy Hormoz Sabet's personal obligation to Republic out of blocked Iranian assets, and may in fact be barred from doing so by federal regulation, citing Executive Order 12205, April 7, 1980, 45 Fed. Reg. 24099.

Discussion

A. Plaintiff's claims against Hormoz Sabet

After reviewing the note, guarantee and related loan documents, and considering the various defenses to enforcement of the guarantee raised by Hormoz Sabet, the Court concludes that plain-

tiff's motion for summary judgment against this defendant should be granted.

1. Extension of the note's due date

Whether, as Hormoz Sabet claims, officers of Republic agreed to extend the due date of the note for one year, or whether, as plaintiff contends, its officers agreed to at most a three-month extension is immaterial to Republic's claim for repayment of the principal amount of the loan, since the due date under the alleged extension has already passed. Hormoz Sabet does not allege that, as part of any extension agreement, Republic ever agreed to accept interest payments at a rate lower than 12% for any period after July 1, 1979, so that the dispute over the duration of the alleged extension is similarly immaterial to plaintiff's claim for interest after that date.

2. Extension agreement: additional terms

There are four additional ways in which the alleged extension agreements -- Dwek's alleged agreement of March 1979, and the alleged Geneva agreement of June 1979, as allegedly ratified by Safra in July 1979 -- could nullify the Sabets' unconditional guarantee to pay any principal and interest on the Firooz note remaining unpaid after the due date. First, the alleged extension agreements could be construed as a modification of the guarantee creating a condition precedent to the Sabets' obligation to pay Republic under the guarantee, namely, Republic's undertaking to collect $1,500,000 directly from Firooz and to repay to the Sabets their payment of $300,000 in principal on the Firooz note, as well as Republic's undertaking to collect $1,000,000 from Zam Zam in order to repay that sum to the Sabets. Repub-

lic's failure to satisfy this new condition precedent would then release the Sabets from any obligations under their guarantee. Second, the Geneva agreement could be viewed as a separate contract or novation of the earlier agreement between the Sabets and Republic which Republic breached, enabling the Sabets to claim damages which offset any amounts which the Sabets might owe to Republic under the April 25, 1977 guarantee. This interpretation is dependent on the Sabets' giving adequate consideration for the new agreement. Third, Republic might be estopped by the alleged actions of its agents in offering these new terms from now enforcing the guarantee against the Sabets. Finally, any enforceable extension agreement between Republic and Firooz might arguably discharge the Sabets' obligations as guarantors under New York UCC § 3-606.

a. Modification

It does not appear that Hormoz Sabet can state a claim that the alleged extension agreements are enforceable modifications under Section 5-1103 of the New York General Obligations Law, which states that such a modification will be enforceable even in the absence of consideration providing the modification is in writing, sugned by the party to be charged, Kent v. Dale Factors Corp., 413 N.Y.S.2d 13 (1st Dept. 1979); Paine-Erie v. Lincoln First Bank, 370 N.Y.S.2d 370 (Sup.Ct. Monroe County 1975)(part payment not sufficient under this section), since Hormoz Sabet has offered no such writings.

While Hormoz Sabet asserts that he could offer such writings if he were granted discovery as to the contents of plaintiff's files in New York and Geneva, the affidavit of Raphael Husni submitted on behalf of plaintiff states that a

search of those records of Republic where such correspondence or writings would be located -- namely, the bank's files on the Sabets and their various companies -- shows that no such writings exist. This defendant has not offered any additional support for his allegations that such documents exist in Republic's files. There thus appears to be no basis for granting Hormoz Sabet's discovery request, and the request is, accordingly, denied. See 6 Moore's Federal Practice ¶ 56.15.

b. Separate agreement

Hor does Hormoz Sabet appear to have a defense based on a separate contract with Republic or on a modification supported by consideration. Even if Republic's officers are assumed to have made the promises which the Sabets allege were made to extend the note's due date and attempt to collect this loan from Firooz and

the Zam Zam note from Zam Zam, Hormoz Sabet has not alleged that the Sabets made reciprocal undertakings which would, as a matter of law, constitute sufficient consideration for Republic's alleged promises. The alleged agreement by the Sabets in Geneva in June to pay principal and interest on the Firooz note appears to be no more than an agreement to do what the Sabets were already bound to do, since the note had fallen due in March and had not been paid by Firooz. There is no basis here on which the Court could assume that the March 29, 1979 due date of the note was effectively modified at any time prior to the alleged Geneva agreement: Hormoz Sabet does not allege that Habib Sabet gave Dwek any consideration for Dwek's alleged March agreement to extend the note's due date, and does not allege that the Sabets concluded an extension agreement binding on Republic on any other oc-

casion prior to the Geneva meeting. Thus, the Sabets' obligations under the guarantee to pay principal and interest were in effect at the time of the alleged meetings with Benezra and Safra, and neither an agreement by the Sabets to make part payment of principal and interest, nor any actual part payment of principal or payment of interest due constitutes valid consideration for an additional agreement by the bank. FDIC v. Heyer, 413 N.Y.S.2d 939, 944 (2d Dept. 1979); National Commercial Bank & Trust Company v. Bart Boat Company, 341 N.Y.S.2d 347 (3d Dept. 1973); Paine Erie, supra. On this basis, the defense is inadequate as a matter of law.

Nor do Hormoz Sabet's nonspecific allegations of "assistance" offered or given to Republic in connection with collection of the AKAM loans show that there is a triable issue of fact as to consideration. Istituto per lo Sviluppo Economica

Dell-Italia Meridionale v. Sperti Products, 47 F.R.D. 310, 317 (S.D.N.Y. 1969); FDIC, supra, 413 N.Y.S.2d at 944 (vague allegations of consideration insufficient to support claim).

c. Estoppel

While the doctrine of estoppel may be used to override the policies of New York General Obligations Law § 5-1103, see Philo Smith v. Uslife Corporation, 554 F.2d 34 (2d Cir. 1977)(discussing use of doctrine to override New York General Obligations Law § 5-701(10)), or the requirement of consideration to support a separate agreement, see FDIC, supra (use of doctrine discussed where oral agreement to extend loan due date not supported by consideration), the doctrine requires a showing that the party asserting estoppel relied on the actions of the other party in a way which would make it inequitable

to allow the other party to assert a defense based on the Statute of Frauds or lack of consideration, see Philo Smith, supra, 554 F.2d at 36; The Savage is Loose Co. v. United Artists, 413 F. Supp. 554, 559 (S.D.N.Y. 1976); see generally Restatement of Contracts 2d, § 90. Here, even if Hormoz Sabet's allegations are presumed to be true, they do not appear sufficient to support a claim of detrimental reliance on Republic's actions. There is no basis for inferring that the alleged conduct of Hormoz Sabet and his father in refraining from paying other outstanding loans was attributable to Republic's alleged assurances as to an extention on the Firooz note, since the Sabets would presumably have been required in any event to repay those other loans when due. As to the Sabets' forbearance from seeking loan extensions, the Court notes that this allegation appears wholly

speculative -- Hormoz Sabet does not allege that any extensions had been offered by the various lenders -- and that, even if such extensions had in fact been offered, foregoing such an opportunity might not constitute sufficient detriment to support an estoppel claims, see Philo Smith, supra, 554 F.2d at 36.

Moreover, even if Republic were deemed estopped by the alleged actions of its officers, such an estoppel would pertain only to the extension of time, not the alleged conditions precedent (Republic's alleged undertakings to collect from Firooz and Zam Zam): Hormoz Sabet does not allege that plaintiff took any action leading any defendant to rely on plaintiff's alleged promise that it would collect from those corporations, and there does not appear to be any factual basis from which to infer support for such a claim. The alleged estoppel does not,

therefore, raise a defense to Republic's claim on the note and guarantee. See Manufacturers Hanover Trust Co. v. Trans National Communications, Inc., 319 N.Y.S.2d 510 (1st Dept. 1971), aff'd, 329 N.Y.S.2d 98 (1972).

d. Discharge

Under UCC Section 3-606, if a creditor agrees to give a debtor an extension of time on an instrument guaranteed by a third party to the instrument without the consent of that guarantor, the guarantor's obligation is discharged. Although this section by its terms appears inapplicable in this instance since the Sabets are not, strictly speaking, parties to the negotiable instrument here (the note), the section might be interpreted to apply to any party in the position of a surety, see Official Comment to New York UCC § 3-606; cf. Mikanis Trading Corp. v. Block, 398

N.Y.S.2d 679 (1st Dept. 1977). Even if the section is applied, however, Hormoz Sabet cannot assert a defense based on this section for two reasons: first, the guarantors in this instance certainly consented to any modification, since the guarantee signed by the Sabets expressly waives such a defense and the Sabets allegedly arranged for the extension; and second, a creditor's agreement to extend time must be valid and binding on the creditor "to operate as a variation of the principal's obligation and thus serve to discharge one secondarily liable," Stahl v. Rovins & West, Inc., 287 N.Y.S.2d 226 (1st Dept.), aff'd., 295 N.Y.S.2d 930 (1968), and, as discussed above, no such agreement is enforceable against plaintiff here.

3. Compliance with Iranian formalities

Whatever the Iranian law may be

on the formalieis required to create an obligation binding on Firooz,[3/] Hormoz Sabet cannot, on this record, assert any failure by Republic to correct deficiencies in the execution of the Firooz note as a defense to Republic's claim. The guarantee signed by the Sabets explicitly waives any defense based on the validity of the note under Iranian law. In addition, Hormoz Sabet is estopped from asserting such a defense by his own representations in the certificates he furnished to Republic that the note was a valid and binding obligation of Firooz.[4/] Moreover, the alleged oral undertaking by Republic to comply with unfulfilled formal requirements under the Firooz by-laws again appears to be unsupported by consideration from the Sabets, and therefore is unenforceable as a matter of law. This in itself would preclude the application of the discharge principles of UCC § 3-606,

see Stahl, supra. So also would the surrounding circumstances, since any modification to the note or guarantee resulting from the alleged agreement -- which, according to Hormoz Sabet's own allegations, he suggested to Republic -- could hardly be said to be without the Sabets' knowledge and consent, another factor for negating discharge under Section 3-606. Even if Hormoz Sabet's allegations as to the formalities required to make the Firooz note binding and Republic's oral agreement to conclude such formalities are assumed to be true, therefore, these allegations would not constitute a defense to plaintiff's claims on the note and guarantee as a matter of law.

4. Other Counterclaims

Hormoz Sabet's remaining counterclaims for damages to his apartment and other damages flowing from the sheriff's

seizure are based on an entirely different factual situation from that underlying plaintiff's claim for payment under the note and guarantee, and are readily severable. They do not form a basis for denial of summary judgment on plaintiff's claim. See Spencer, White & Prentis v. Pfizer, Inc., 498 F.2d 358 (2d Cir. 1974); cf. Curtis-Wright Corp. v. General Electric Co., ___ U.S. ___, 48 U.S.L.W. 4422 (1980)(final judgment on severed claims); Chemical Bank v. Panayotopulos, 388 N.Y.S.2d 287 (1st Dept. 1976)(severability under New York Law -- suit on promissory note).

5. Satisfaction by Setoff

It is apparent that, given the magnitude of the potential claims against the Iranian assets deposited with Republic and frozen by Presidential order, and the possibility that the United States Govern-

ment will require use of those funds for purposes other than satisfaction of Republic's existing claims against Firooz and other expropriated Iranian corporations, see, e.g., Wall St. J., July 8, 1980 at 30, col. 1-2, Republic's claims against Firooz or the guarantors of the Firooz note have not been satisfied by the bank's setoff of Iranian assets against its claims, including the Firooz obligations. In fact, as plaintiff points out, not only have the claims not yet been satisfied, but Executive Order 12205 of April 7, 1980, 45 Fed. Reg. 24099, ¶ 1-101(d)(iii) and (iv) may require Republic to proceed against the guarantor at this juncture. In addition, the Sabets waived, in their guarantee, any defense based on changes in applicable United States law, which presumably would include the assets freeze and the setoff. Finally, it is clear that under New York law,

Republic has no obligation to proceed against Firooz assets before asserting its claims against the guarantors. See New York General Obligations Law § 15-701. Accordingly, Hormoz Sabet cannot assert the Iranian assets freeze and enforced setoff as a defense to this motion.

B. Plaintiff's claims against Habib Sabet

On this record, granting plaintiff's motion for summary judgment as to Habib Sabet also appears in order.

Because Habib Sabet, after being served with process in this case, submitted an affidavit which fails to raise issues of improper service and lack of personal jurisdiction, it appears that Habib Sabet may have waived the right to assert those defenses to Republic's action against him.

If it is assumed, however, that Hormoz Sabet's raising of the service-of-

process issue as to Habib Sabet in Hormoz's Local Rule 9(g) statement indicates that Habib Sabet intends to raise this defense, and is sufficient to put plaintiff on notice that such a defense is being raised, the defense would be without merit. Habib Sabet came to New York to sign to guarantee, made interest payments in New York, and conducted further business in New York relating to this loan and to his other interests, including those connected with Gulf Associates, Inc. of New York, Firooz's designated agent for service of process in New York, see letter of Hormoz Sabet of March 13, 1979, Exhibit B, Hormoz Sabet affidavit of October 12, 1979, during the term of the note. This appears sufficient to support a finding that Habib Sabet conducted business in New York under CPLR § 302. See generally Plaza Realty Investors v. Guy B. Bailey, Jr., et ano, 484 F.Supp. 335 (S.D.N.Y.

1979). Habib Sabet was served by a method authorized by CPLR § 308(2), and, in accordance with CPLR § 313, by a process server authorized in France. Thus, service of process appears proper under Rules 4(e) and (f), F.R.Civ.P., and CPLR §§ 302, 308 and 313. United States v. Montreal Trust Co., 35 F.R.D. 216 (S.D.N.Y. 1964).

Under either assumption, it appears that Habib Sabet has had sufficient contacts with New York to satisfy the requirements of due process as to a finding that the Court has personal jurisdiction over this defendant, see World-Wide Volkswagen Corp. v. Charles S. Woodson, ___ U.S. ___, 48 U.S.L.W. 4079 (1980).

Assuming also that Habib Sabet joins in those defenses raised by Hormoz Sabet, the Court finds those defenses insufficient for the reasons stated above. With respect to the issues raised by Hormoz Sabet's allegations of an oral agree-

ment by Republic to comply with unsatisfied formalities in the execution of the note, the Court notes that Habib Sabet authorized Hormoz Sabet to act for Firooz in representing the corporation's interests to the bank, see Firooz Corporation Resolution of December 1976, Exhibit E, Affidavit of Raphael Husni, and thus also appears estopped by Hormoz's certification that the required Firooz formalities had been satisfied.

C. Plaintiff's claims against Firooz

Service on Firooz by service on its contractually designated agent for service of process, Gulf Associates, would normally be proper under F.R.Civ.P. 4(d)(7) and New York CPLR § 311(1). See Sunrise Toyota v. Toyota Motor Co., 55 F.R.D. 519 (S.D.N.Y. 1972). In this instance, however, while the Islamic Provisional Revolutionary Government of Iran

has not, apprantely, repudiated the note, it is unclear whether either the Iranian government or the new officers of the expropriated company have repudiated or intend to repudiate that portion of the note designating Gulf Associates as Firooz's agent for service of process, and whether, accordingly, papers served on Gulf Associates have reached or will reach Firooz. In light of this uncertainty, this Court directs that service shall be made on Firooz Corporation by the methods specified in Judge Kevin T. Duffy's Opinion and Order of June 4, 1980, as modified by his order of June 14, 1980, in the consolidated Iranian cases in this district, New England Merchants National Bank v. Iran Power Generation and Transmission Company, et al. and following cases, No. 79 Civ. 6380 et al. (S.D.N.Y. 1980). If no answering appers or other response from Firooz are received within 60 days of the

date of service by the method outlined in Judge Duffy's order, a default judgment will be entered on behalf of Republic against defendant Firooz.

Summary

Plaintiff's motion for summary judgment in lieu of complaint based on the guarantee of Habib Sabet and Hormoz Sabet for payment of principal in the amount of $1,200,000 and interest on that sum at a 12% annual rate from July 1, 1979 is granted against those defendants.

Defendant Hormoz Sabet may file pleadings asserting a counterclaim against plaintiff for damages suffered as a result of the sheriff's execution of the order of attachment against Hormoz Sabet.

A motion for default judgment against defendant Firooz Corporation on plaintiff's claim under the note will be granted if plaintiff complies with the

service requirements indicated above and if Firooz fails to respond by the time indicated above.

As it appears that the remaining counterclaim by Hormoz Sabet may be resolved by agreement between the parties, and as it is uncertain whether Firooz Corporation will, if served as indicated above, answer plaintiff's motion, the case will be placed on the Suspense docket of this Court, subject to reopening at the request of any party stating that the party is prepared to actively litigate the issues remaining in this case.

SO ORDERED.

/s/ William E. Connor
United States District
Judge

Dated: New York, New York
July 18, 1980

FOOTNOTES

1. At least as of December 1976, both Habib and Hormoz Sabet were also members of the Firooz Board of Directors.

2. Hormoz Sabet further asserts that Republic consented to this extension by pointing to the failure of Edmond Safra, Republic's Honorary Chairman, to mention the loan to the Sabets at the wedding of Safra's daughter on June 17, 1979, which the Sabets attended.

3. As per the choice of law provisions in the note and guarantee, the Court has applied principles of New York law in evaluating this and other defenses raised by the Sabets.

4. Firooz would also appear bound by these representations, as well as by those of its counsel in its opinion letter.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REPUBLIC NATIONAL BANK OF NEW YORK,

Plaintiff,

- against -

HABIB SABET, HORMOZ SABET and FIROOZ CORPORATION,

Defendants.

79 Civ. 4290 (WCC)

OPINION AND ORDER

A P P E A R A N C E S :

KRONISH, LIEB, SHAINSWIT, WEINER & HELLMAN, ESQS.
Attorneys for Plaintiff
1345 Avenue of the Americas
New York, New York 10105

ADAM WALINSKY, ESQ.,
ALAN LEVINE, ESQ.,
THOMAS J. LENNON, ESQ.,
Of Counsel

COUDERT BROTHERS
Attorneys for Defendant Hormoz Sabet
200 Park Avenue
New York, New York 10166

MARK D. LEBOW, ESQ.,
JERRY L. SIEGEL, ESQ.,
LYNNE M. BARRY, ESQ.,
Of Counsel

CONNER, D. J.:

Presently before the Court are defendant Hormoz Sabet's motions for reconsideration, for a stay of proceedings in this case while its counterclaims are resolved, for a stay pursuant to the Suggestions of Interest filed by the United States in Iranian-related cases in this district, or for a stay pending appeal to the Second Circuit Court of Appeals of this Court's Opinion and Order dated July 18, 1980, pursuant to Rule 62, F.R.Civ.P., and plaintiff's motions to strike the Third through Seventh counterclaims asserted by Hormoz Sabet and for an order directing entry of judgment in favor of plaintiff pursuant to Rule 54(b), F.R.Civ.P.

The Court assumes familiarity with its previous Opinion and Order, and will not repeat here either the factual background or the legal issues discussed

in that Opinion.

a) Motion for reconsideration

Hormoz Sabet has advanced no new facts or legal theories in support of his motion to reconsider, and, for reasons discussed at length in the July Opinion and Order, the Court remains of the opinion that plaintiff is entitled to summary judgment on the guarantee by Hormoz Sabet. The motion to reconsider is granted and the request to modify or rescind the Court's previous Opinion and Order is denied.

b) Stay pending resolution of counterclaims; motion to dismiss

As to the counterclaims asserted by defendant Hormoz Sabet, plaintiff's motion to strike the Third through Seventh counterclaims is granted, since these claims are inconsistent with the stipulation entered into by the parties settling Hormoz Sabet's motion to vacate

plaintiff's attachment, and constitute no more than attempts to relitigate in different guise issues disposed of by this Order and the Court's previous Opinion and Order.

The first two counterclaims are for, at most, $401,000, an amount substantially lower than the $1,200,000 plus interest awarded to plaintiff by this Order and the Court's previous Opinion and Order. As stated in the previous Opinion, plaintiff has expressed its willingness to resolve the amount in dispute by agreement; if the parties cannot now stipulate to the amount of damages incurred as a result of the sheriff's levy upon the contents of the apartment, and so inform the Court within ten days of the date of this Order, the Court will refer the matter to a magistrate for a hearing and recommendations. Since the matters at issue on this counterclaim are

not, however, intertwined factually with plaintiff's claim on the loan guarantee, the pendency of these counterclaims provides no basis for the delay of entry of judgment against Hormoz Sabet on plaintiff's claim. Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1.

c) Stay in light of proceedings in Iranian cases

In a letter dated October 10, 1980, the United States Attorney for the Southern District of New York expressed the position of the United States that the stay of proceedings requested in the Government's first Suggestion of Interest filed in this case is not applicable to defendants Habib and Hormoz Sabet. This position logically extends to the further Suggestion of Interest filed by the Government in the Iranian cases following resolution of the hostage crisis. Accordingly, the Court determines that these

Suggestions of Interest form no basis for a stay of execution of judgment against Hormoz Sabet.

d) Entry of final judgment

Beyond the factor discussed above, the absence of the pendency of factually-related counterclaims or any counterclaim for an amount in excess of the amount to which plaintiff is entitled under the loan guarantee, two other factors noted in Curtiss-Wright, supra, suggest that Rule 54(b) certification is appropriate in this instance. First, plaintiff is the only active litigant among the several defendants named here, a fact perhaps attributable to his New York residence; thus, it appears that granting Rule 54(b) certification here will not raise any substantial possibility of multiple appeals by the various defendants raising the same legal issues. Second, plaintiff has already lost substantial investment income

(the difference between the current market rates and the amount set in the note) due to Hormoz Sabet's prolonging of this lawsuit with his motion for reconsideration, and further loss of interest income would be, as the Supreme Court recently ruled, a proper basis for finding that there is "no just reason for delay," Curtiss-Wright, supra, 446 U.S. at 11. Accordingly, the Court determines that there is no just reason for delay of entry of judgment, and plaintiff shall submit a judgment on ten days' notice in the amount of $1,200,000 plus interest at a 12% annual rate from July 1, 1979.

SO ORDERED.

/s/ William E. Conner
United States District Judge

Dated: New York, New York
March 25, 1981

Opposition

Supreme Court, U.S.
FILED
APR 21 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HABIB SABET, HORMOZ SABET and
FIROOZ CORPORATION,

Petitioners,

—v.—

REPUBLIC NATIONAL BANK OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Dated: April 21, 1982

ADAM WALINSKY
KRONISH, LIEB, SHAINSWIT,
WEINER & HELLMAN
1345 Avenue of the Americas
New York, New York 10105
(212) 841-6000
Attorney for Respondent
Republic National
Bank of New York

Of Counsel:
JOSEPH S. HELLMAN
BARRY LEVENFELD

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1767

HABIB SABET, HORMOZ SABET and
FIROOZ CORPORATION,

Petitioners,

—v.—

REPUBLIC NATIONAL BANK OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Petitioners seek to avoid payment of their unconditional boilerplate guarantee of a promissory note. The Petition is only the last gasp of a strategy that has abused the process of the law to delay that payment for nearly three years. The Petition should be denied forthwith.

In April 1975 Respondent Republic National Bank of New York ("Republic") loaned money to Firooz Corporation. The loan was evidenced by a promissory note (the "Note") executed by Firooz. The Note was unconditionally guaranteed by Petitioners Hormoz and Habib Sabet. Firooz defaulted on its obligations under the Note in March of 1979. In July of 1979, Republic instituted suit for payment of principal and interest: against Firooz on the Note, and against Habib and Hormoz

Sabet on their unconditional guarantee. The Petition raises *no* issues as to the terms, interpretation, validity or effect of the Sabets' guarantee.

All six defenses advanced by the Sabets below were rejected by the District Court. That Court also ruled that all the Sabets' counterclaims should be dismissed or severed, and granted summary judgment in favor of Republic on the unconditional guarantee. Appendix to Petition A-30-53. The Sabets moved for reargument; District Judge Conner found that "Sabet has advanced no new facts or legal theories in support of his motion to reconsider . . ." and denied the motion. Appendix to Petition A-57. No issues concerning the District Court's ruling, the purported defenses, or the unsuccessful counterclaims are raised by the Petition.

The Sabets appealed to the Court of Appeals for the Second Circuit. They there argued that the District Court erred, *inter alia*, in denying additional discovery, dismissing certain counterclaims, and refusing to find that their unconditional guarantee had somehow been extended or modified. The Court of Appeals unanimously affirmed the summary judgment granted by the District Court. Appendix to Petition A-1-3. None of the issues presented on appeal and briefed for the Second Circuit are raised by the Petition.

The Petition puts forward only one claim,* and that one is preposterous. It is that the Iran-United States Hostage Agreements divested the federal courts of jurisdiction over Republic's claim against the Sabets. The perfunctory four-page argument advanced in support of the Petition leaves no doubt that it is only another excuse for the Sabets to further delay payment of their adjudicated debt. The Petition manufactures

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* The one claim asserted in the Petition is expressed in two questions, one dealing with exclusivity of forum and the other with jurisdiction. But both questions relate to a single issue: the effect of the Iran-United States Hostage Agreements on Republic's judgment against the Sabets. The arguments advanced in this brief respond to that issue, and are equally applicable to both questions.

an issue that was never raised, briefed, argued, considered or passed on below; it blatantly misreads treaty provisions; and it fabricates and misconstrues the law.

The Petition is frivolous. The questions it purports to raise are in total, absolute conflict with the plain meaning of the Hostage Agreements; moreover, they are complete *non sequiturs*, made utterly irrelevant by the decisions below.

1. Petitioners' questions are based on a nonsensical, unsupportable misreading of the Hostage Agreements.

The sole purported authority for the Sabets' Petition is the following provision of the Hostage Agreements (emphasis added):

> An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding *claims of nationals of the United States against Iran and claims of nationals of Iran against the United States*, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights . . .*

Petitioners urge this Court to rule (1) that this provision establishes the Iran-United States Claims Tribunal as the exclusive forum for the resolution of Republic's claims against the Sabets and (2) that it ousts the federal courts of jurisdiction over this action.

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* Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, January 19, 1981 (the "Claims Settlement Agreement"), Article II(1).

The argument is simply nonsense. The provision plainly confers *no jurisdiction at all* on the Claims Tribunal over Republic's claim against the Sabets. The Tribunal is granted jurisdiction over (a) claims of United States nationals against *Iran*, and (b) claims of Iranian nationals against the *United States*. But this case involves only a claim by a United States national, Republic, against two Iranian nationals, the Sabets. A claim by a national of the United States against a *national* of Iran clearly does not fall within the jurisdiction of the Claims Tribunal.*

Indeed, it could hardly be otherwise. The very purpose of the Declaration of the Government of the Democratic and Popular Republic of Algeria, January 19, 1981 (the "Algerian Declaration") is the termination of "all litigation as between the *Government* of each party and the nationals of the other . . . ." Algerian Declaration, General Principles (B) (emphasis added). The United States agreed "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against *Iran and its state enterprises*. . . ." *Id.* (emphasis added). Obviously, Hormoz and Habib Sabet are neither "Iran" nor "its state enterprises."**

The explanation which accompanied the Hostage Agreements upon their transmittal to Congress by the Department of State reveals that the State Department has a similar understanding of the jurisdiction accorded the Claims Tribunal:

> The claims settlement agreement establishes the Iran-U.S. Claims Tribunal for the purpose of deciding (1) claims of

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* The District Court accepted the position advanced below by the United States Attorney for the Southern District of New York that the hostage situation had no applicability to the Sabet defendants. Appendix to Petition A-59-60. Both the government and the District Court recognized that the Hostage Agreements have no relevance to an action by a United States national against Iranian nationals. *Id.*

** Hormoz and Habib Sabet, as Iranian nationals, cannot be considered "Iran" even under the expansive definition accorded that term in Article VII(3) of the Claims Settlement Agreement.

> U.S. nationals against Iran, (2) claims of Iranian nationals against the United States, and (3) certain claims of the United States and Iran against each other.

United States Department of State, Selected Documents No. 19, "Hostage Agreements Transmitted to Congress," March 12, 1981, at 2. There is not a shred of support in the Hostage Agreements, or the Executive Orders promulgated thereunder, for the proposition here advanced by the Sabets that those agreements, and the claims settlement machinery which they establish, encompass a claim by a United States *national* against an Iranian *national*. *See also* United States-Iran Agreement on Release of the American Hostages, Message to Congress, January 19, 1981, Administration of Jimmy Carter 3041 ("[T]here will be established an international tribunal to adjudicate various disputed claims by U.S. nationals against Iran. . . .").

Nor does anything in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981) suggest a different result. *Dames & Moore* assumed without discussion that the Hostage Agreements apply only to claims by United States institutions against Iran and its state enterprises. *Id.*, 69 L.Ed.2d at 928, 931, 937. It also held that the Hostage Agreements did not detract from the jurisdiction of the lower federal courts. Indeed, *Dames & Moore* expressly recognized that claims not explicitly relegated to the Tribunal would be tried in United States courts:

> [W]e do not believe that the President has attempted to divest the federal courts of jurisdiction. . . . As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will "revive" and become judicially enforceable in United States courts.

69 L.Ed.2d at 943. The federal courts are not divested of jurisdiction over claims which cannot be presented to the Claims Tribunal.

In fact, the Tribunal has already ruled (by a 6 to 3 vote) that despite Iran's contention to the contrary, the Claims Tribunal

has no jurisdiction over claims of Iran against nationals of the United States. *Case A/2*, rendered December 21, 1981, *reprinted in Iranian Assets Litigation Reporter* 4,278-83 (February 19, 1982). The Tribunal said:

> It can easily be seen that the parties set up very carefully a list of the claims . . . which could be submitted to the arbitral tribunal . . . [T]hey knew well that such a Tribunal could not have wider jurisdiction than that which was specifically decided by mutual agreement.

Id., at 4,279. *A fortiori*, if one of the signatory parties cannot take its claim against a national of the other before the Claims Tribunal, then a national of one cannot pursue there its claim against a national of the other.

Petitioners' argument would lead to amusing, indeed ludicrous results. Petitioners, in effect, urge this Court to rule that the exclusive forum for deciding claims of United States nationals against Iranian nationals is the Claims Tribunal at the Hague. By this logic, whenever an Iranian stops his rent payments or fails to pay his American Express bill, his landlord or credit card lender can only sue before the Hague Tribunal. That Petitioners' debt was occasioned by their unconditional guarantee of the obligations of an Iranian corporation makes no difference. Republic's judgment against two Iranian nationals on the guarantee was based on an independent, separate and severable obligation. That judgment remains unaffected by the Hostage Agreements.

2. The decisions below are supported by independent, determinative grounds which are unchallenged by Petitioners.

Judgment was entered against Hormoz Sabet on May 14, 1981, and against Habib Sabet on July 13, 1981. The judgments were affirmed by the Court of Appeals on December 21, 1981. Both the judgments and the affirmance were handed down after the execution of the Hostage Agreements and their implementation by Executive Orders. At least two distinct and

independent rationales were advanced by the District Court to support its position that none of the Hostage Agreements or related Executive Orders had any bearing on Republic's claim against the Sabets. *Neither* of these rationales was disputed by Sabet on appeal to the Second Circuit, and *neither* has been addressed in the Petition.

First, the unconditional guarantee signed by each of the Sabets contains the following waiver (emphasis added):

> 1. Each of the undersigned hereby agrees that *the obligations of the undersigned hereunder shall be unconditional irrespective of the genuineness, validity, legality or enforceability of the Note* or any other circumstance which might otherwise constitute a legal or equitable discharge of a surety or guarantor and regardless of any law, rule, regulation, decree or order *now or hereafter in effect* in any jurisdiction purporting to affect in any manner any of the terms of the Note or the rights of the Bank or any subsequent holder. . . . (Appendix to Petition A-8-9).

The court below ruled that this language was sufficient to waive "any defense based on changes in applicable United States law, which presumably would include the assets freeze and the setoff." Appendix to Petition A-46. The same reasoning extends to any defense based on the Claims Settlement Agreement or the Algerian Declaration. Because Petitioners waived any defense based upon them, an interpretation and application of the Hostage Agreements is not necessary for a decision here.*

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* Petitioners might suggest, in the extremity, that their argument goes to subject-matter jurisdiction, which cannot be waived. However, the source of the Sabets' obligation is not the same as the source of the original obligation of Firooz. Their guarantee, rather, is a separate and independent contract. *See infra*. Obviously contracts of Iranian nationals are not by their mere nationality subject to sole jurisdiction at the Hague.

Additionally, it was Petitioners who removed this action to federal court, and it is now almost three years since the action began and over

Second, the fact that Republic's only recourse against Firooz Corporation may be before the Claims Tribunal at the Hague is completely beside the point. The District Court held that under New York law the Sabets' guarantee was an independent—and unconditional—contractual obligation. Thus Republic was under *no obligation* to seek payment from Firooz (the primary obligor) before collecting from the Sabets (the guarantors). Appendix to Petition A-46-47; *Pink* v. *Investors Syndicate Title & Guaranty Co.*, 246 App. Div. 172, 175-76, 285 N.Y.S. 155, 159 (3d Dep't), *aff'd*, 273 N.Y. 483, 6 N.E.2d 414 (1936); New York General Obligations Law § 15-701; *cf.* 57 N.Y. Jur., Suretyship and Guaranty §§ 265-68. The Court of Appeals unanimously affirmed the District Court's interpretation and rejected the Sabets' argument that Republic should seek payment from Firooz. Nor have Petitioners challenged this interpretation. Thus it remains the law of this case that, under New York law, Republic need not pursue Firooz. The Supreme Court need not indulge the Sabets' speculation as to Republic's ability, based on treaty provisions, to seek relief against Firooz at the Hague. The Sabets' unconditional guarantee is a fully adequate ground for Republic's judgment, entirely independent of the obligations of Firooz.

For these reasons, no far-reaching interpretation of the jurisdictional implications of the Algerian Declaration or Claims Settlement Agreement is required here. Under the governing New York law, the Sabets' unconditional guarantee is alone sufficient to support Republic's judgment.

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a year since the execution of the Hostage Agreements. This Court cannot condone a practice of removing a case to a court allegedly lacking jurisdiction, holding objections to jurisdiction in reserve, and then asserting them only after defeat on the merits. *Cf. Chesbrough* v. *Northern Trust Co.*, 252 U.S. 83 (1920).

Conclusion

The Petition makes no showing that the questions it raises are worthy of the consideration of this Court; nor does it touch upon the criteria set forth in Rule 17 of the Revised Rules of this Court. There is no conflict among circuits, no departure from the "accepted and usual course of judicial proceedings"; and no showing that the issues raised are of importance to anyone but the Sabets. This is exactly the kind of issue the Supreme Court should be spared. *Cf. Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923); *N.L.R.B.* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502, 503 (1951). All the Sabets seek here is yet another appeal. They are not entitled to it.

The tactics employed by the Sabets and their counsel could fill a textbook on how to avoid payment of adjudicated debt obligations. This Petition for Writ of Certiorari is simply another chapter. It should be the final chapter. The Petition should be denied.

Dated: New York, New York
April 21, 1982

Respectfully submitted,

ADAM WALINSKY
Attorney for Respondent
Republic National Bank of New York

KRONISH, LIEB, SHAINSWIT,
WEINER & HELLMAN
1345 Avenue of the Americas
New York, New York 10105
(212) 841-6000

Of Counsel:

JOSEPH S. HELLMAN
BARRY LEVENFELD